

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY G. SIMMONS
Claimant

VS.

LEARJET, INC.
Self-Insured Respondent

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Docket Nos. 1,014,567;
1,018,394; & 1,023,526

ORDER

Respondent appealed the January 17, 2007, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on April 25, 2007.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

During oral argument to this Board, an issue arose whether the medical records that were attached to the preliminary hearings should be considered part of the record for this appeal. They should not. During litigation of these claims, respondent's attorney objected to those records being included as part of the evidentiary record. Accordingly, under K.A.R. 51-3-5a(a), those records are excluded.

In addition, at oral argument to the Board, the parties agreed these three claims should be treated as one accident and that May 24, 2005, should be utilized as the date of accident for purposes of computing claimant's benefits.

Finally, the parties stipulated at oral argument that respondent paid claimant 11.43 weeks of temporary total disability benefits for his left arm and shoulder injuries and 11

weeks of temporary total disability benefits for his right arm and shoulder injuries, as represented in the supplemental brief that respondent filed with the Board.

ISSUES

Claimant filed an application for hearing for a November 17, 2003, accident and resulting injuries to his left shoulder, arm and neck. That application was assigned Docket No. 1,014,567. Claimant also filed an application for an accident and resulting pain in his right shoulder and arm that occurred from January 22 through July 20, 2004, due to overcompensating for his left shoulder injury. That second application was assigned Docket No. 1,018,394. And finally, claimant filed an application for bilateral upper extremity injuries that occurred from May 9 through July 22, 2005, and each day worked thereafter. The third alleged accident was assigned Docket No. 1,023,526.

Although three applications were filed that alleged three separate accidents, the Judge treated claimant's injuries as occurring in one accident and entered only one award. As indicated above, the parties agreed claimant's injuries should be treated as resulting from one May 24, 2005, accident.

In the January 17, 2007, Award, Judge Clark determined claimant was injured out of and in the course of his employment with respondent through May 24, 2005. After averaging the ratings provided by two of the physicians who provided functional impairment opinions (Drs. Pedro A. Murati and Chris D. Fevurly), the Judge found claimant sustained a 28.5 percent whole person functional impairment and awarded claimant permanent partial general disability benefits under K.S.A. 44-510e for that impairment.

Respondent contends Judge Clark erred. Respondent did not contest that claimant injured his left shoulder at work. But respondent challenged Judge Clark's finding that claimant injured his right shoulder and his wrists at work. Instead, respondent argued claimant's right shoulder injury and bilateral carpal tunnel syndrome were the natural and probable consequences of claimant's age, degenerative body conditions and preexisting conditions. In the alternative, respondent argued the Board should utilize the impairment percentages provided by Drs. Daniel J. Prohaska and J. Mark Melhorn (the court-ordered treating physicians) and disregard the impairment percentages provided by Dr. Murati. Moreover, respondent contends claimant's award of disability benefits should be based upon the scheduled injury statute, K.S.A. 44-510d, and the recent *Casco*¹ decision. Finally, respondent argues K.S.A. 44-510f(a)(4) limits claimant's award of disability benefits to \$50,000.

¹ *Casco v. Armour Swift-Eckrich*, No. 93,984, ___ Kan. ___ (March 23, 2007).

In summary, respondent requests the Board to reduce the January 17, 2007, Award by using the impairment ratings provided by Dr. Prohaska and Dr. Melhorn, only awarding claimant benefits for his left shoulder injury or, in the alternative, only awarding claimant permanent disability benefits for his bilateral upper extremity injuries as scheduled injuries, and limiting any award of permanent disability benefits to \$50,000.

Conversely, at oral argument claimant requested the Board to base its Award upon claimant's permanent whole person functional impairment, which claimant contends is somewhere between 30.5 percent and 42 percent. Claimant argued Dr. Prohaska's functional impairment opinion should be entirely disregarded because the doctor did not follow the *AMA Guides*² (4th ed.) when rating claimant's impairment. Finally, claimant contended his permanent disability benefits should be computed as a non-scheduled injury under K.S.A. 44-510e for two reasons: first, *Casco* was not controlling as the mandate had not been issued in that decision and that he had simultaneously injured both upper extremities, and second, he had also injured his neck, which prevented his injuries from being treated as multiple scheduled injuries under K.S.A. 44-510d.

The issues before the Board on this appeal are:

1. Did claimant injure his neck, right shoulder and develop bilateral carpal tunnel syndrome as a result of an accident or series of repetitive traumas that arose out of and in the course of his employment with respondent?
2. What is the nature and extent of claimant's injuries and disability?
3. Is claimant's award of disability benefits limited to \$50,000?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. On November 17, 2003, claimant injured his left shoulder when he was knocking down some metal shelving with his fists. Claimant reported the injury to respondent and was referred for medical treatment. Dr. Wilkinson saw claimant and referred him to Dr. Stein for a possible neck injury. When Dr. Stein failed to find a neck injury, claimant was referred to Dr. Daniel J. Prohaska for left shoulder treatment.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

2. Claimant first saw Dr. Prohaska for his left shoulder in February 2004. The doctor diagnosed acromioclavicular joint post traumatic degenerative joint disease and a possible rotator cuff tear. In April 2004, the doctor performed left shoulder surgery, which included rotator cuff repair, subacromial decompression, and a distal clavicle excision. In June 2004, claimant returned to work for respondent at light duty.
3. Several weeks after the left shoulder injury, claimant began having right shoulder symptoms, which claimant attributed to overcompensating for his left shoulder injury. Those right shoulder symptoms, however, especially increased during physical therapy for his left shoulder injury. As claimant's right shoulder symptoms continued to increase, claimant reported those symptoms to respondent and ultimately returned to Dr. Prohaska for treatment.
4. This is not the first time claimant had symptoms in his left shoulder. In 1996, claimant fell at work onto his left shoulder and developed crepitus and adhesions, which eventually restricted its range of motion. Claimant obtained medical treatment, which included a manipulation under anesthesia by a Dr. Johnstone. Following Dr. Johnstone's treatment, claimant received medical treatment from a Dr. Hearon, who it appears also may have manipulated claimant's left shoulder. Claimant was eventually released from medical treatment without restrictions. Claimant did not receive any permanent disability benefits for the left shoulder and he did not seek any additional medical treatment for his left shoulder until the November 2003 incident at work. Moreover, the crepitus that Dr. Johnstone initially found is not noted in Dr. Hearon's later records.
5. In October 2004, Dr. Prohaska began treating claimant's right shoulder complaints. The doctor diagnosed a possible right rotator cuff tear, which was later confirmed by MRI. Consequently, in November 2004, the doctor operated on claimant's right shoulder. In January 2005, claimant returned to work for respondent at light duty.
6. Claimant initially returned to clerical work. But when his strength increased, he resumed his bench tech job, which required him to use basic hand tools and perform appreciable gripping, twisting, pushing, pulling, and lifting. In short, the job was hand-intensive. In approximately May 2005, claimant began to experience locking, pain and numbness in his hands and wrists. Claimant reported these symptoms to respondent. Claimant did not recall having any problems with his hands before May 2005.
7. After a preliminary hearing, Dr. J. Mark Melhorn was authorized to provide claimant medical treatment. In October 2005, Dr. Melhorn began treating claimant's hands and wrists. In December 2005, when injections did not resolve claimant's symptoms, the doctor performed carpal tunnel release surgery on both wrists.

8. After recovering from his bilateral wrist surgeries, claimant returned to work for respondent and he eventually returned to his bench tech job doing work similar to that which he performed before his injuries. Presently, claimant's hands lock. He is unable to work overhead as both shoulders pop and pain shoots across his shoulders.

CONCLUSIONS OF LAW

1. **Did claimant injure his right shoulder and develop bilateral carpal tunnel syndrome as the result of personal injury by accident that arose out of and in the course of his employment with respondent?**

Respondent does not challenge that claimant injured his left shoulder at work. On the other hand, respondent contends that claimant failed to prove his right shoulder injury and his bilateral carpal tunnel syndrome arose from claimant's work activities.

Before an injured worker can qualify for benefits under the Workers Compensation Act, the worker must prove that the injury resulted from an accident that arose out of and in the course of employment.³ Moreover, it is well-settled that all the natural consequences arising from a work-related accident, including new and distinct injuries, also qualify for benefits under the Act.⁴

The evidence is overwhelming that claimant's right shoulder injury is the natural consequence of his left shoulder injury. Claimant attributed his right shoulder complaints to protecting the injured left shoulder and to the physical therapy he received after the left shoulder surgery. Dr. Prohaska, claimant's shoulder surgeon, concluded claimant had degenerative changes in his right shoulder that were aggravated by overusing the right shoulder. In addition, claimant's medical expert, Dr. Pedro A. Murati, also determined claimant injured his right shoulder from favoring the injured left shoulder, which made the right shoulder injury a natural and probable consequence of the left shoulder injury. Dr. Melhorn did not comment on claimant's shoulder injuries. Even Dr. Chris D. Fevurly, whom respondent hired to evaluate claimant for these proceedings, did not challenge claimant's right shoulder injury as being related to his work. Rather, Dr. Fevurly merely noted that some of claimant's bilateral shoulder injuries were related to activities outside of work.

³ K.S.A. 44-501(a).

⁴ *Casco v. Armour Swift-Eckrich*, No. 93,984, ___ Kan. ___ (March 23, 2007); *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Considering the entire record, the Board concludes claimant's right shoulder injury is the natural consequence of his left shoulder injury. Therefore, claimant should receive workers compensation benefits for both shoulder injuries.

Likewise, the evidence is overwhelming that claimant's carpal tunnel syndrome was caused by repetitive traumas from his work. Claimant's testimony is credible that his work was hand-intensive. And Dr. Murati related the bilateral carpal tunnel syndrome to those work activities. Again, Dr. Fevurly attributed claimant's bilateral carpal tunnel syndrome to both work- and non-work-related activities.

In summary, the Board finds claimant's bilateral shoulder injuries and bilateral carpal tunnel syndrome resulted from personal injury by accident that arose out of and in the course of his employment with respondent.

2. What is the nature and extent of claimant's injuries and disability?

Four doctors testified about the extent of claimant's permanent impairment. But only Dr. Murati and Dr. Fevurly attempted to rate all of claimant's injuries. Dr. Prohaska only rated claimant's shoulder injuries and Dr. Melhorn only rated claimant's upper extremity impairments due to the bilateral carpal tunnel syndrome.

Regarding the right upper extremity and shoulder, Dr. Murati found claimant sustained a 10 percent impairment due to the carpal tunnel syndrome, a 10 percent impairment for the subacromial decompression to his shoulder, and an 18 percent impairment for severe glenohumeral crepitus in his shoulder. Combining those ratings, Dr. Murati concluded claimant sustained a 33 percent right upper extremity impairment, which converted to a 20 percent whole person impairment.

Regarding the left upper extremity and shoulder, Dr. Murati rated claimant as having a 10 percent impairment for the carpal tunnel syndrome, a 10 percent impairment for the subacromial decompression to the shoulder, a 10 percent impairment for distal clavicle excision, and an 18 percent impairment for severe glenohumeral crepitus. Combining those left upper extremity ratings, the doctor determined claimant sustained a 40 percent left upper extremity impairment, which converted to a 24 percent whole person impairment.

In addition, Dr. Murati was the only doctor who believed claimant had a neck injury, which the doctor rated as comprising a five percent whole person impairment. Combining both upper extremity impairments with the neck impairment, Dr. Murati concluded claimant sustained a 42 percent whole person impairment under the *AMA Guides* (4th ed.).

Dr. Fevurly concluded claimant had a 19 percent whole person impairment for bilateral shoulder impingement and bilateral carpal tunnel syndrome. For the left upper

extremity impairment, the doctor found a 12 percent impairment for the shoulder injury and a five percent impairment for the carpal tunnel syndrome, which combine for a 16 percent impairment to the upper extremity. For the right upper extremity impairment, Dr. Fevurly concluded claimant had a six percent impairment for the shoulder and an eight percent impairment for the carpal tunnel and triggering in claimant's fingers, which combine for a 14 percent impairment to the upper extremity. Dr. Fevurly rated claimant using the *AMA Guides* (4th ed.), but he used different methods and tables than those utilized by Dr. Murati.

Dr. Fevurly testified that part of claimant's 19 percent whole person rating included crepitus. Moreover, Dr. Fevurly indicated claimant had preexisting crepitus and adhesive capsulitis in his left shoulder that accounted for four percent of the 12 percent impairment he found in that upper extremity, although the record does not indicate how he arrived at that rating or that such rating was derived by using the *Guides*.

Only Dr. Fevurly concluded claimant had impairment in his left shoulder before his November 2003 accident. The doctor admitted, however, on cross-examination that he saw no medical records dated between 1996 and claimant's November 2003 accident that mentioned left shoulder crepitus. Moreover, Dr. Fevurly conceded claimant had severe left shoulder crepitus that the *Guides* would rate at 18 percent to the upper extremity and mild right shoulder crepitus the *Guides* would rate at six percent to the upper extremity.

As indicated above, Dr. Prohaska only rated claimant's shoulder impairments. The doctor rated claimant's right upper extremity and shoulder impairment at six percent and his left upper extremity and shoulder impairment at 10 percent, which combine for a 10 percent whole person impairment. Moreover, in rating claimant's left shoulder, Dr. Prohaska only gave claimant a five percent impairment for the left distal clavicle resection when the *Guides* states that it comprises a 10 percent impairment to the upper extremity. The doctor's rationale for rejecting the *Guides* rating was that it was too high. In addition, the doctor did not include any impairment rating for the crepitus in claimant's shoulders because the doctor believed only crepitus from arthritis or a synovial articular process should be rated under the *Guides*. Dr. Prohaska alone testified that claimant had the wrong type of crepitus to be rated under the *Guides*.

Dr. Prohaska concluded it was possible claimant had a rotator cuff injury before the November 2003 accident. Nonetheless, the doctor believed the November 2003 accident alone created a 10 percent left upper extremity impairment.

Finally, Dr. Melhorn rated the impairment claimant sustained from the bilateral carpal tunnel syndrome. Dr. Melhorn rated claimant's left upper extremity impairment at 5.3 percent and his right upper extremity impairment at 5.3 percent also, which combine for a 6.36 percent whole person impairment. Nonetheless, the doctor acknowledged on

cross-examination that if he had used Table 16 from the *AMA Guides* (4th ed.), both upper extremities would be rated at 10 percent for the carpal tunnel syndrome. The doctor, however, added that he did not use that table because of writings in a medical newsletter.

Dr. Melhorn did not rate the impairment in claimant's shoulders. But the doctor did testify that combining the 6.36 percent whole person impairment with Dr. Prohaska's 10 percent whole person impairment for the shoulders would result in a 15.36 percent whole person impairment.

The greater weight of the medical evidence establishes claimant sustained bilateral shoulder injuries and bilateral carpal tunnel syndrome from the work that he performed for respondent. The Board is not persuaded claimant sustained an injury to his neck. Further, claimant did not argue (and the record does not establish) that an injury to a clavicle is not part of the shoulder structure and, therefore, should be compensated under the provisions of K.S.A. 44-510e. Consequently, claimant is entitled to receive workers compensation benefits for bilateral upper extremity injuries as provided by the scheduled injury statute, K.S.A. 44-510d.

When a worker's injuries are contained within the schedules of K.S.A. 44-510d, permanent disability benefits are computed using that statute. But when injuries are not within those schedules, permanent disability benefits are computed under K.S.A. 44-510e. In *Casco*,⁵ the Kansas Supreme Court swept away over 70 years of precedent by holding that bilateral upper extremity injuries that do not render a worker permanently and totally disabled should be compensated as two separate injuries under the provisions of K.S.A. 44-510d, commonly known as the scheduled injury statute. The Court wrote, in part:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d. When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant

⁵ *Casco v. Armour Swift-Eckrich*, No. 93,984, ___ Kan. ___ (March 23, 2007).

is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d. K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.⁶

Because of *Casco*, the Board must modify the Award as the Judge computed claimant's permanent disability benefits under K.S.A. 44-510e. Moreover, under *Casco*, claimant either receives benefits for a permanent total disability or permanent disability benefits under K.S.A. 44-510d(a)(13). Any presumption claimant is permanently and totally disabled is rebutted by claimant's testimony he has resumed working for respondent. Consequently, claimant is entitled to receive permanent disability benefits for two arm and shoulder injuries.

The Board is most persuaded by the functional impairment opinions provided by Dr. Fevurly and Dr. Murati. Therefore, for the right upper extremity and shoulder the Board averages the functional impairment rating provided by Dr. Fevurly (14 percent) with the rating provided by Dr. Murati (33 percent) and concludes claimant has sustained an approximate 24 percent impairment to his right arm and shoulder. For the left upper extremity and shoulder, the Board averages the rating provided by Dr. Fevurly (16 percent) with the rating provided by Dr. Murati (40 percent) and concludes claimant has sustained a 28 percent impairment to the left arm and shoulder. Consequently, claimant is entitled to receive benefits under K.S.A. 44-510d for a 24 percent disability to the right arm and for a 28 percent disability to the left arm.

Finally, the Board concludes respondent has failed to prove the amount of preexisting functional impairment claimant may have had in either of his upper extremities before he developed the injuries that are the subject of this proceeding. Consequently, the request to reduce claimant's benefits under K.S.A. 44-501(c) should be denied.

3. Is claimant's award of disability benefits limited to \$50,000?

When adding the temporary total disability benefits and the permanent disability benefits claimant is entitled to receive for his bilateral upper extremity injuries, the total amounts awarded exceed \$50,000. Respondent argues that claimant should only receive \$50,000 under the provisions of K.S.A. 44-510f(a)(4). The Board disagrees.

K.S.A. 44-510f(a) provides:

⁶ *Id.* at Syl ¶¶ 7-10.

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

Respondent relies on subparagraph four of the above-quoted statute. The plain language of that subparagraph, however, provides that the \$50,000 limit applies to the permanent partial disability benefits awarded for any injury. Accordingly, the request to limit claimant's disability benefits to \$50,000 for both upper extremity injuries must be denied for two reasons. First, the \$50,000 limit is applicable to permanent disability benefits only and, therefore, the temporary total disability benefits are not considered for purposes of applying that limit. And second, the statute applies the limit to "*an injury* or aggravation thereof." Accordingly, the plain language of the statute indicates that each injury is subject to the \$50,000 limit. Undeniably, claimant is entitled to receive benefits for two scheduled injuries in this proceeding. And the permanent disability benefits for the separate bilateral upper extremity injuries are not added together for purposes of applying the \$50,000 limit. Instead, each upper extremity injury has its own \$50,000 limit in permanent disability benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the January 17, 2007, Award entered by Judge Clark.

⁷ K.S.A. 2006 Supp. 44-555c(k).

Larry G. Simmons is granted compensation from Learjet, Inc., for a May 24, 2005, accident and resulting disability to his right upper extremity. Mr. Simmons is entitled to receive 11 weeks of temporary total disability benefits at \$449 per week, or \$4,939, plus 51.36 weeks of permanent partial disability benefits at \$449 per week, or \$23,060.64, for a 24 percent permanent partial disability to the right arm and shoulder, making a total award of \$27,999.64, which is all due and owing less any amounts previously paid.

In addition, Larry G. Simmons is granted compensation from Learjet, Inc., for a May 24, 2005, accident and resulting disability to his left upper extremity. Mr. Simmons is entitled to receive 11.43 weeks of temporary total disability benefits at \$449 per week, or \$5,132.07, plus 59.80 weeks of permanent partial disability benefits at \$449 per week, or \$26,850.20, for a 28 percent permanent partial disability to the left arm and shoulder, making a total award of \$31,982.27, which is all due and owing less any amounts previously paid.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent
John D. Clark, Administrative Law Judge